JCT Ltd v Muniandy Nadasan & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL Appeal NoS W-02(NCC)(W)-1228–07 OF 2014 AND W-02(NCC)(W)-1229–07 OF 2014

ABDUL AZIZ ABD RAHIM, DAVID WONG AND ABANG ISKANDAR JJCA

30 DECEMBER 2015

Companies and Corporations — Fraudulent trading — Elements of offence — Whether business conducted in manner so as to defraud creditors — Whether element of dishonesty established — Standard of proof in cases of fraudulent trading — Whether on balance of probabilities — Whether trial judge erred — Whether there was injustice — Companies Act 1965 s 304

In this appeal ('Appeal No 1229'), the respondents were the employees of CNLT (Far East) Bhd ('CNLT'), a wound up company which initially carried out the business of manufacturing and sale of yarn. The appellant ('JCT'), was a substantial shareholder in CNLT. One Dato' Prem Krishna Sahgal ('Sahgal') was the executive managing director of CNLT who also effectively controlled CNLT. The respondents claimed for arrears of salary and workers' compensation in the sum of RM2,910,201.78 based on the tort of conspiracy to injure as it was alleged that CNLT provided the solvency declaration to the Kuala Lumpur Stock Exchange ('BURSA') showing that they were solvent when in fact they were not. It was further alleged that this misled the respondents, who were then the creditors, BURSA as well as the general public. It was also contended that Sahgal and the rest of the defendants, despite having the knowledge that CNLT was insolvent, continued to mislead the employees, creditors, investors and general public that CNLT was a going concern so as to enable it to continue to trade and be given credit facilities, by unsuspecting creditors and suppliers. Therefore, the respondents filed a declaration at the High Court that the businesses of CNLT had been carried out with intent to defraud the creditors of CNLT and a declaration that the appellant ought to be liable for all the debts or other liabilities of CNLT personally, as well as damages. It was a claim that was founded on s 304 of the Companies Act 1965 ('the CA'). However, the appellant denied any intention to defraud nor were they dishonest, as claimed by the respondents. The High Court allowed the respondents' claim. Aggrieved by the said decision, the appellant filed the present appeal. The issue raised in this appeal was whether the learned judge had misapprehended the intent underlying, and the scope of s 304 of the CA and had by reason of that misapprehension, had misdirected herself. In support of the appeal, the appellants submitted that the learned judge had erred in law in adopting a sliding scale as to the criminal standard of proof in cases of

fraudulent trading under s 304 of the CA; the facts of the case do not support a claim under s 304 of the CA; and alternatively, the appellant was not responsible for the incurrence of the said debt.

Held, dismissing the appeal (Appeal No 1229):

(1) There was no merit in the contention that the s 304 of the CA is criminal in nature. In fact, it contains provisions that give rise to both civil in nature as is contained under s (1) for a declaration, and a criminal prosecution as is contained under the provisions of sub-s (5). The operative burden of proof will be triggered depending on which of these two subsections is being invoked before the court for determination. There was complete harmony in the provisions as contained in s 304 of the CA (see para 26).

(2) There was no merit in the legal point pertaining to the proper attendant standard of proof to be discharged by the respondent as raised by the appellant. If ever, the learned trial judge was in error with regard to the standard of proof in play, she had in fact erred in favour of the appellant, when she had subjected the plaintiffs' evidence before her against a higher standard, when in law, the lower standard, namely on the balance of probabilities ought to have sufficed. As such, no injustice had been occasioned to the appellant in the circumstances. There was therefore no appealable error that would have otherwise required appellate intervention (see para 31).

(3) Section 304(1) of the CA requires proof that the errant person must be shown to be responsible to doing business of the company in such a manner so as to defraud the creditors of the company. Merely doing business with knowledge that the company will not be able to pay later is not per se sufficient to trigger the subsection. There must be proven as well the element of dishonesty on the part of the alleged perpetrator when such business was conducted. The evidence in this case had shown clearly many circumstances on the part of Sahgal where such element of dishonesty on his part can be readily attributed to him (see paras 39 & 41).

(4) There was overwhelming evidence to show that CNLT, through Sahgal, had carried on business with the intention to defraud the creditors, including the plaintiffs. Objectively, the effect of Sahgal's action would be to deceive creditors in the sense that they would not foreclose on the loans given to CNLT. The fraudulent siphoning of monies to JCT would also deprive creditors of ready funds that could be used to service their loans. In the context of the evidence adduced, Sahgal was properly the person envisaged under s 304(1) of the CA against whom the declarations had been correctly made. The alternative submission by Sahgal that he was not liable under s 304(1) of the CA must also fail. The trial judge was

correct in declaring that the business of CNLT was carried on by Sahgal with intent to defraud the creditors pursuant to s 304 of the CA (see paras 45, 69 & 71).

(5) The actions of CNLT through Sahgal had been designed to defraud the creditors. He was dishonest in his dealings, the results of which had been that the creditors were defrauded. He dealt in transactions that had dubious objectives which not only had adverse ramifications on CNLT itself, but they also had the effect of defrauding the creditors by holding out that CNLT was a going concern, so that the creditors would continue to do business with CNLT, when in fact, the latter was insolvent. Further, the payments made to JCT were business transactions that were carried out by Sahgal to defraud the creditors, as they were clearly deprived of repayments of their loans to CNLT. As such, the trial judge was justified in making the consequential order against JCT to repay the monies, so dubiously paid to it, back to the provisional liquidators of CNLT (see para 45).

[Bahasa Malaysia summary

Dalam rayuan ini ('Rayuan No 1229'), pihak responden merupakan pekerja CNLT (Far East) Bhd ('CNLT'), sebuah syarikat yang telah digulung yang pada awalnya menjalankan perniagaan pembuatan dan penjualan yan. Pihak perayu ('JCT'), merupakan pemegang saham utama di CNLT. Seorang Dato' Prem Krishna Sahgal ('Sahgal') merupakan pengarah urusan eksekutif CNLT yang mengawal CNLT. Pihak responden menuntut tunggakan gaji dan pampasan pekerja berjumlah RM2,910,201.78 berdasarkan kepada tort pengkomplotan untuk mencederakan oleh kerana dikatakan CNLT telah memberikan akuan kesolvenan kepada Bursa Saham Kuala Lumpur ('BURSA') yang menunjukkan bahawa mereka solven sedangkan hakikatnya mereka tidak solven. Ia selanjutnya dikatakan bahawa perkara ini telah menyebabkan responden terperdaya, yang pada ketika itu merupakan pemiutang, BURSA dan juga orang awam. Ia juga turut dikatakan bahawa Sahgal dan defendan yang lain, walaupun mempunyai pengetahuan yang CNLT tidak solven, terus-menerus memperdaya pekerja, kreditor, pelabur dan orang awam bahawa CNLT masih berjalan bagi membolehkan ia terus berniaga dan diberikan kemudahan kredit, oleh pemiutang dan pembekal yang tidak menyangka apa-apa. Oleh yang demikian, pihak responden telah memfailkan suatu deklarasi di Mahkamah Tinggi bahawa perniagaan CNLT telah dijalankan dengan niat untuk memperdaya pemiutang CNLT dan suatu deklarasi bahawa perayu hendaklah bertanggungan bagi semua hutang atau liabiliti CNLT yang lain secara peribadi, dan juga ganti rugi. Ia merupakan suatu tuntutan yang berasaskan kepada s 304 Akta Syarikat 1965 ('AS'). Walau bagaimanapun, pihak perayu menafikan apa-apa niat untuk memperdaya mahupun melakukan perkara tidak jujur, sebagaimana yang dinyatakan oleh responden. Mahkamah Tinggi membenarkan tuntutan responden. Tidak

berpuas hati dengan keputusan itu, pihak perayu memfailkan rayuan ini. Isu yang dibangkitkan dalam rayuan ini adalah sama ada hakim terpelajar telah tersalah faham tentang niat yang tersembunyi, dan ruang lingkup s 304 AS dan disebabkan oleh salah faham itu, telah menyebabkan dirinya tersalah arah. Untuk menyokong rayuan ini, pihak perayu telah menghujahkan bahawa hakim terpelajar telah terkhilaf dari segi undang-undang apabila mengambil suatu skala gelangsar bagi standard pembuktian jenayah dalam kes-kes penipuan perniagaan di bawah s 304 AS; fakta kes ini tidak menyokong suatu tuntutan di bawah s 304 AS; dan secara alternatifnya, pihak perayu tidak bertanggungan bagi hutang tersebut.

Diputuskan, menolak rayuan ini (Rayuan No 1229):

(1) Penyataan bahawa s 304 AS bersifat jenayah adalah tidak bermerit. Sebaliknya, ia mengandungi peruntukan yang bersifat kedua-duanya iaitu sivil sebagaimana yang terkandung dalam s (1) untuk suatu deklarasi, dan pendakwaan jenayah sebagaimana yang terkandung dalam peruntukan sub-s (5). Beban pembuktian yang terpakai adalah bergantung kepada yang mana antara dua subseksyen ini yang digunakan di hadapan mahkamah untuk dipertimbangkan. Terdapat keharmonian yang sempurna dalam peruntukan-peruntukan ini sebagaimana yang terkandung dalam s 304 Akta Syarikat (lihat perenggan 26).

(2) Hujah perundangan yang dibangkitkan oleh perayu berhubung dengan standard pembuktikan yang sepatutnya dibuktikan oleh responden adalah tidak bermerit. Jika hakim bicara terpelajar terkhilaf dalam penggunaan standard pembuktian yang sepatutnya sekalipun, kekhilafan beliau memihak kepada perayu, apabila beliau telah meletakkan keterangan pihak plaintif yang dibentangkan di hadapannya pada suatu standard yang lebih tinggi, sedangkan mengikut perundangannya, standard yang lebih rendah, iaitu atas imbangan kebarangkalian sepatutnya sudah mencukupi. Oleh yang demikian, tiada ketidakadilan berlaku terhadap perayu dalam hal ini. Oleh itu, tidak terdapat kekhilafan yang boleh dirayu yang memungkinkan suatu campur tangan di peringkat rayuan (lihat perenggan 31).

(3) Seksyen 304(1) AS menghendaki bukti bahawa orang yang melakukan kesalahan itu hendaklah dibuktikan bertanggungjawab menjalankan perniagaan syarikat dalam keadaan yang memperdaya pemiutang syarikat. Jika hanya menjalankan perniagaan dengan pengetahuan bahawa syarikat tidak akan mampu untuk membayar kemudian nanti tidak mencukupi untuk membuatkan subseksyen itu terpakai. Elemen ketidakjujuran pada pihak orang yang dikatakan melakukan perbuatan semasa perniagaan itu dijalankan, hendaklah dibuktikan. Keterangan dalam kes ini telah menunjukkan dalam beberapa keadaan, elemen ketidakjujuran boleh dikaitkan kepada Sahgal (lihat perenggan 39 & 41).

(4) Terdapat keterangan yang begitu jelas yang menunjukkan CNLT, melalui Sahgal, telah menjalankan perniagaan dengan niat untuk memperdaya pemiutang, termasuk plaintif. Secara objektifnya, kesan daripada tindakan Sahgal adalah untuk menipu pemiutang yang mana mereka tidak akan menghalangtebus pinjaman yang diberikan kepada CNLT. Perbuatan menyeleweng wang tunai kepada JCT juga akan menghalang pemiutang daripada mendapat dana yang telah tersedia yang boleh digunakan untuk melangsaikan hutang kepada mereka. Dalam konteks keterangan yang dikemukakan, Sahgal merupakan orang yang dimaksudkan di bawah s 304(1) AS yang deklarasi terhadapnya telah dibuat dengan betul. Hujahan alternatif oleh Sahgal bahawa beliau tidak bertanggungan di bawah s 304(1) AS juga mesti ditolak. Hakim bicara adalah betul apabila memutuskan bahawa perniagaan CNLT telah dijalankan oleh Sahgal dengan niat untuk memperdaya pemiutang menurut s 304 AS (lihat perenggan 45, 69 & 71).

(5) Tindakan CNLT melalui Sahgal telah direka untuk memperdaya pemiutang. Beliau tidak jujur dalam urusannya, akibatnya pemiutang telah diperdaya. Beliau berurusan dalam transaksi yang mempunyai objektif yang diragui yang bukan sahaja mempunyai kesan buruk terhadap CNLT sendiri, tetapi juga mempunyai kesan memperdaya pemiutang dengan mempercayai bahawa CNLT masih berjalan, supaya pemiutang akan terus menjalankan perniagaan dengan CNLT, sedangkan pada hakikatnya, CNLT telah pun menjadi tidak solven. Selanjutnya, pembayaran yang dibuat kepada JCT merupakan transaksi perniagaan yang dijalankan oleh Sahgal untuk memperdaya pemiutang, memandangkan mereka telah dengan jelas dihalang daripada pembayaran balik pinjaman yang diberikan mereka kepada CNLT. Oleh itu, hakim bicara telah bertindak dengan wajar apabila membuat perintah berbangkit terhadap JCT untuk membayar balik wang, yang diragui pembayaran kepadanya, balik pemiutang kepada penyelesaian sementara CNLT (lihat perenggan 45).]

Notes

For cases on elements of offence, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 469–470.

Cases referred to

Aktieselskabet Dansk Skibsfinansiering v Brothers and ors [2001] 2 BCLC 324 (refd)

Ang Hiok Seng @ Ang Yeok Seng V Yim Yut Kiu (Personal Representative Of The Estate Of Chan Weng Sun, Deceased) [1997] 2 MLJ 45, FC (refd)

Augustus Barnett & Sons Ltd, Re [1986] BCLC 170, Ch D (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Khawaja v Secretary of State for the Home Department [1984] AC 74, HL (refd)
Leitch (William C) Bros Ltd, Re [1932] 2 Ch 71, Ch D (refd)
R v Grantham [1984] 3 All ER 166, CA (refd)
Sarflax Ltd, Re [1979] 2 WLR 202, Ch D (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)
Siow Yoon Keong v H Rosen Engineering BV [2003] 4 MLJ 569, CA (folld)

Legislation referred to

Bankruptcy Act 1967 s 53
Companies Act 1965 ss 176, 293, 304, 304(1), (5), (6)

Appeal from: Civil Suit No 22NCC-68–01 of 2013 (High Court, Kuala Lumpur)

Ariff Rozhan (William Lim and Johnson Lim with him) (Zaid Ibrahim & Co) in Civil Appeal No W-02(NCC)(W)-1228–07 of 2014 for the appellant.
Wong Rhen Yen (Emily Goh with him) (Ong Kok Bin & Co) in Civil Appeal No W-02(NCC)(W)-1228–07 of 2014 for the respondents.
Gurdit Singh (Saaran Nadarajah with him) (Saaran & Co) in Civil Appeal No W-02(NCC)(W)-1229–07 of 2014 for the appellant.
Wong Rhen Yen (Emily Goh with him) (Ong Kok Bin & Co) in Civil Appeal No W-02(NCC)(W)-1229–07 of 2014 for the 1st to 83rd respondents.
M Menon (S Ravenesan with him) (S Ravenesan) in Civil Appeal No W-02(NCC)(W)-1229–07 of 2014 for the 84th respondent.

Abang Iskandar JCA (delivering judgment of the court):

BRIEF FACTS OF THE CASE

[1] All plaintiffs were the employees of CNLT (Far East) Bhd, the ninth defendant ('CNLT'). The CNLT was in the business of manufacture and sale of yarn. CNLT had been wound up on 16 January 2009 and in liquidation.

[2] The first to sixth defendants were all the directors of CNLT. The seventh defendant, who did not enter an appearance in this action, was at all material times, the human resources manager of CNLT. The eighth defendant, JCT Ltd, was a company incorporated in India and was a substantial shareholder of CNLT. It was, in fact, CNLT's largest single shareholder.

[3] More specifically, the first defendant, Dato' Prem Krishna Sahgal ('Sahgal') was (and is) at all material times the executive managing director of CNLT. He is an Indian national who has been residing in Malaysia at all material times. He was also effectively in control of CNLT at all material times.

[4] The plaintiffs' claim for arrears of salary and workers' compensation in the sum of RM2,910,201.78 was premised on the tort of conspiracy to injure.

[5] The plaintiffs claimed that the board of directors of CNLT had provided the solvency declaration to the BURSA to show that they were solvent, when actually they were not, thereby misleading the body of creditors, including the plaintiffs and BURSA, as well as the general public.

[6] The plaintiffs further claimed that despite the fact that the defendants were aware that CNLT had been insolvent and ceased to be an ongoing concern since 2003, the defendants kept on misleading the employees, creditors, investors and general public that CNLT was a going concern so to be able to continue to trade and be given credit by unsuspecting creditors and suppliers.

[7] The plaintiffs stated that from March 2008 until 16 January 2009 (the date when CNLT was finally wound up), no payment was given to them. A memorandum was issued on 30 April 2008 and 10 May 2008 to the employees placing them on full pay and assuring them that their contracts of employment continued in force.

[8] The plaintiffs contended that the memorandum issued amounted to a deception to the effect that they would receive their remuneration and benefits in full when it was known to the defendants that there was no likelihood of the employers would be paid.

[9] Therefore, the plaintiffs filed this suit claiming for a declaration that the businesses of CNLT had been carried out with intent to defraud the creditors of CNLT and a declaration that the defendants ought to be liable for all the debts or other liabilities of CNLT personally, as well as damages. It was a claim that was founded on s 304 of the Companies Act 1965.

[10] The defendants denied any intention to defraud nor were they dishonest, as claimed by the plaintiffs.

[11] The learned High Court judge allowed the plaintiffs' claim on 13 June 2014. Aggrieved by the said decision, the first and eighth defendants filed these appeals before us.

[12] We had the opportunity to hear parties during submissions at the appeal. It has to be noted that the appellant in case W-02(NCC)(W)-1229–07 of 2014 ('Appeal No 1229') had added CNLT as the 84th respondent. While in the case of W-02(NCC)(W)-1228–07 of 2014 ('Appeal No 1228') it is not. As a result, a notice of motion, encl 9a was filed by CNLT in Appeal No 1228

to strike out the appeal. The main ground of the application has been that the failure of the appellant to name the CNLT as co-respondent in Appeal No 1228 was fatal as the decision of the High Court dated 13 June 2014 had affected CNLT. After due consideration of the affidavits and submissions by all parties, we had dismissed encl 9a and had proceeded to hear both appeals on their merit, without CNLT as a co-respondent in Appeal No 1228.

[13] We had reserved the decisions on these two for deliberation. Our decisions in both these appeals are unanimous.

THE APPEALS

[14] The grounds of the appellant's appeal in Appeal No 1228 as enumerated in the memorandum of appeal, inter alia, are as follows:

(a) the learned judge erred in law and failed to appreciate that the provisions of s 293 of the Companies Act 1965 ('the CA') read together with s 53 of the Bankruptcy Act 1967 ('the BA') are only applicable or relevant to the liquidator;

(b) the learned judge erred in law and failed to appreciate that the issue of undue preference (under s 293 of the CA read together with s 53 of the BA) was not specifically pleaded by the respondents and as such, the respondents are precluded from raising the said issue; and

(c) the learned judge erred in law and/or in fact in finding that CNLT's payments of USD1.25m to the appellant were preferred repayment to an unsecured creditor, in preference over the rest of the body of unsecured creditor.

[15] We had decided to write separate judgments for the two appeals. This court's decision in Appeal No 1228 is expressed in the judgment written by my learned brother, Justice David Wong Dak Wah whilst this present and immediate judgment encapsulates our decision in relation to Appeal No 1229.

[16] In Appeal No 1229, the primary contention of the appellant is that the learned judge had misapprehended the intent underlying, and the scope of s 304 of the CA and had by reason of that misapprehension, she had misdirected herself. In the appellant's written submission, it is contended that:

(a) the learned judge had erred in law in adopting a sliding scale as to the criminal standard of proof in cases of fraudulent trading under s 304 of the CA;

(b) the facts of the case do not support a claim under s 304 of the CA; and

(c) alternatively, the appellant was not responsible for the incurrence of the said debt.

[17] Indeed, before us, learned counsel Dato Malik Imtiaz, acting for the appellant one Dato' Sahgal, in Appeal No 1229 had emphasised the point that his main contention in this appeal, would be premised on the legal argument as expressed in paragraph 'a' in para 16 above. To repeat his own words, learned counsel had said, 'my attack is on the law'.

[18] It was contended before us that the learned trial judge had erred with regard to the standard of proof used in determining the quantum of proof required of the respondents to establish the alleged fraudulent trading under s 304 of the CA. It was his contention that s 304 of the CA was a criminal provision and as such, it was incumbent on the respondents to prove their case against the appellant on the standard of proof that is one beyond reasonable doubt. He pointed to the presence of sub-s (5) to s 304 of the CA to anchor his contention that s 304 of the CA was for all intents and purposes, a criminal provision that ought to attract the operation of a higher burden in order to establish fraudulent trading under sub-s (1) to s 304 of the CA. His complaint was premised on the statement by the learned trial judge on the attendant degree of proof that was incumbent on the respondents to prove their claim as follows at p 19:

> 44. In other words the degree of proof ought to be something well beyond a balance of probability and more akin to the standard of beyond reasonable doubt.

[19] From a perusal of the paragraphs devoted by the learned trial judge to this issue, it is clear to us that she had correctly directed her mind to the fact that the case that she was dealing with had been a civil case. The critical consideration before Her Ladyship had involved the element of fraudulent trading as it had been concerned with a claim by the respondents premised upon s 304 of the CA. She had gone on to cite the case of *Khawaja v Secretary of State for the Home Department* [1984] AC 74 where Lord Scarman had said:

> A preponderance of probability suffices but the degree of probability must be such that the court is satisfied.

[20] Those words by Lord Scarman had led her to surmise that the burden of proof obtaining in the case before her required that the respondents would have to lead evidence that is higher than the one on the balance of probabilities and one that was nearer to the burden of proving the case beyond reasonable doubt. We noted throughout her judgment that the learned trial judge had been very aware as well as she was very careful in her appreciation of the evidence before coming to the conclusion that she did. Right until the end of her decision, the learned trial judge again reiterated the degree of the burden of proof which she

had subjected the evidence to as led before her when arriving at her conclusions on the findings of facts. This can be seen at p 98 of her decision, when she said:

> I should also specify that in arriving at these conclusions I have applied a standard of proof higher than that of a balance of probabilities.

[21] But the learned counsel for the appellant had submitted before us that she had misdirected herself on the proper burden that ought to be in play. According to him, even if the sub-s 304(1) of the CA was civil in nature, the correct burden to be applied in this case ought to be the criminal burden, namely one that is proof beyond reasonable doubt. That is because the claims by the plaintiffs had been concerned with carrying on business with fraudulent intent to defraud them as creditors. Based on that, learned counsel for the appellant had contended that the standard of proof that was applicable was the one that was beyond reasonable doubt.

[22] Having considered the submissions of parties on this issue, we are of the respectful view that the learned trial judge had correctly treated s 304(1) of the CA as a provision that provides for a civil claim against an errant director on the ground of fraudulent trading. If successful, the court may order that the errant person to pay compensation to the injured party or parties.

[23] The learned counsel for the appellant had, among others, adverted our attention to the existence of sub-s (5) to s 304 of the CA whereby the former subsection had provided for penal sanctions for 'a person who was knowingly a party to the carrying on the business with that intent or purpose shall be guilty of an offence against this Act'. According to him, that provision has effectively made s 304 of the CA a criminal provision and thereby requiring a corresponding discharge by the respondents of the criminal burden of proof that is beyond reasonable doubt.

[24] With respect, we are not able to agree with such submission by learned counsel for the appellant. To our mind, sub-s (5) to s 304 of the CA is a separate provision whereby it gives the regulator the necessary power to prosecute such a person so described there under and such person, if found guilty by the court, could be staring at the penal sanctions as spelt out thereunder. To our mind too, while sub-s (1) to s 304 of the CA provides a platform for a civil claim to be pursued, sub-s (5) on the other hand empowers the regulator to criminalise such impugned conduct on the part of any such person. They provide for a different kind of possible action against such a person. And yes, they co-exist in the same s 304 of the CA albeit in different subsections. This statutory arrangement is actually immediately recognised by sub-s (6) to s 304 of the CA itself. That sub-s (6) reads as follows:

> (6) This section shall have effect notwithstanding that the person concerned is criminally liable apart from this section in respect of the matters on the ground of which the declaration is made.

[25] To our mind, it cannot be more clear than that. Section 304 of the CA is a hybrid provision providing for both civil remedies as well as criminal sanction. But that does not matter for much, as was stated by the Court of Appeal in the case of *Siow Yoon Keong v H Rosen Engineering BV* [2003] 4 MLJ 569 ('*Siow Yoon Keong* case') where it was held:

> We are of the view that the issue is the interpretation of s 304(1) and whether the facts of this case fall within the meaning of that subsection. It does not matter whether the relationship between Rosen and Ventura is one of principal and agent or otherwise. It does not matter whether the section carries both civil and criminal liabilities. It does not matter whether there are other remedies. The question is whether on the facts, the case falls within the ambit of s 304(1) or not and whether this is a fit and proper case for the learned judicial commissioner (as he then was) to make the declaration that he did.

[26] As such, we see no merit in the contention that the s 304 of the CA is criminal in nature. In fact, it contains provisions that give rise to both civil in nature as is contained under s (1) for a declaration, and a criminal prosecution as is contained under the provisions of sub-s (5) therein. The operative burden of proof will be triggered depending on which of these two subsections is being invoked before the court for determination. There is complete harmony in the provisions as contained in s 304 of the CA. For learned counsel to conclude that s 304(1) of the CA requires proof beyond reasonable doubt, to our mind, cannot therefore be sustained. We are with the learned trial judge that the case before her had been a civil case and that the burden on the respondents was not one that was beyond reasonable doubt.

[27] Now, under the law, at least, in most common law jurisdictions, there are only two kinds of standard of proof to be discharged, in settling a dispute before the courts, one of which ought to apply on the party which desires judgment to be given in its favour by the court. In a civil case, the plaintiff carries the burden of proving its case on the balance of probabilities. In fact, the defendant in the same civil case also shoulders the same burden of proof to convince the court of its case in order to get a favourable decision at the end of the day. In a criminal trial, the prosecution carries throughout the case, the burden of having to prove its case against an accused person, on a standard that is beyond reasonable doubt, before the accused person can be found guilty and be convicted of the charge.

[28] This court notes that somehow, when the civil case has been concerned with the element of fraudulent conduct as alleged against the defendant by the

plaintiff, the burden of proof which the plaintiff has to discharge is one that is higher than on the balance of probabilities but lower than beyond reasonable doubt. There appears to be a standard that exists in the middle, in between the two standards of proof. There had been cases, where the courts had ruled that for the purpose of proving fraud or adultery in a divorce case in a civil claim, the plaintiff there would have to prove it on the balance of probabilities, but towards a higher end of the band, within the 'on the balance of probabilities standard'. That was what the learned trial judge had done in this case. In fact, such cases, involving fraud in a civil case until recently, had attracted proof beyond reasonable doubt. We therefore could appreciate fully, the slight predicament that the learned trial judge had faced in dealing with issue on the standard of proof in the course of hearing and trying this case where the central issue involved the alleged fraudulent trading on the part of the appellant. It is in this respect that learned counsel for the appellant had contended that the burden of proof that was in play ought to be one that is beyond reasonable doubt. Indeed, the case of *Ang Hiok Seng @ Ang Yeok Seng V Yim Yut Kiu (Personal Representative Of The Estate Of Chan Weng Sun, Deceased)* [1997] 2 MLJ 45 was cited in support for that proposition, where the Federal Court had held, at pp 59–60 as follows:

> From the wide definition of 'fraud' under s 17 of the Contracts Act 1950 as well as leading authorities on the subject, where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on the balance of probabilities. It is now well established that an allegation of criminal fraud in civil or criminal proceedings cannot merely be based on suspicion or speculation.

[29] But be that as it may, the position is now settled. Our apex court had recently, in the case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584 ('*Sinnaiyah* case') ruled that in civil cases involving proof of fraud or fraudulent conduct, the plaintiff would need only to prove his case on the balance of probabilities. We quote learned Justice Richard Malanjum CJ (Sabah and Sarawak) in the *Sinnaiyah* case, where he had said, at para 52 as follows:

> [52] We therefore reiterate that we agree and accept the rationale in *In re B (Children)* that in a civil claim even when fraud is alleged the civil standard of proof, that is, on the balance of probabilities, should apply. And perhaps it is not out of place here to restate the general rule at common law that, 'in the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities'.

[30] We are of the view that the proper standard of proof, required to be proved as stated by the apex court in the *Sinnaiyah* case in a civil case involving allegation of fraud is applicable to this case. This is because this case, being an

on-going appeal, is therefore, still a 'live' case, as opposed to those cases which had been finally adjudicated in terms of their final appeals. To our mind, that was what the apex court had meant when it said that the ruling did not have a retrospective effect. It does not apply to cases that had been finally decided. It is our considered view that all the cases pending disposal in the appeal courts would qualify as 'future' cases referred to in the *Sinnaiyah* case because it would be incongruous indeed for the appeal courts to apply a wrong law in deciding those cases which final fate have not yet been finally determined. All cases which are pending final disposal of their appeals, are therefore included in the so-called 'future cases' in the *Sinnaiyah* case. In other words, the operative standard in this case is the normal civil standard of proving on the balance of probabilities.

[31] Premised on the above, we therefore find that there is no merit in the legal point pertaining to the proper attendant standard of proof to be discharged by the respondent as raised by learned counsel for the appellant. If ever, the learned trial judge was in error with regard to the standard of proof in play, she had in fact erred in favour of the appellant, when she had subjected the plaintiffs' evidence before her against a higher standard, when in law, the lower standard, namely on the balance of probabilities ought to have sufficed. As such, no injustice had been occasioned to the appellant in the circumstances. There was therefore no appealable error that would have otherwise required our appellate intervention.

[32] Learned counsel for the appellant had also raised the complaint before us that the learned trial judge had given too wide a latitude pertaining to the reach of s 304 of the CA.

[33] Before we proceed further, we find it opportune here to reproduce s 304 of the CA which reads as follows:

> (1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.
>
> (2) Where a person has been convicted of an offence under sub-section 303(3) in relation to the contracting of such a debt as is referred to in that section the Court, on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that the person shall be personally responsible without any limitation of

liability for the payment of the whole or any part of that debt.

(3) When the Court makes any declaration pursuant to sub-section (1) or (2), it may give such further directions as it thinks proper for the purpose of giving effect to that declaration, and in particular may make provision for making the liability of any person under the declaration a charge on any debt or obligation due from the company to him, or on any charge or any interest in any charge on any assets of the company held by or vested in him or any corporation or person on his behalf, or any person claiming as assignee from or through the person liable or any corporation or person acting on his behalf, and may from time to time make such further order as is necessary for the purpose of enforcing any charge imposed under this subsection.

(4) For the purpose of subsection (3) 'assignee' includes any person to whom or in whose favour by the directions of the person liable the debt, obligation, or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration, not including consideration by way of marriage, given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(5) Where any business of a company is carried on with the intent or for the purpose mentioned in sub-section (1) every person who was knowingly a party to the carrying on the business with that intent or purpose shall be guilty of an offence against this Act. Penalty: Imprisonment for three years or ten thousand ringgit.

(6) This section shall have effect notwithstanding that the person concerned is criminally liable apart from this section in respect of the matters on the ground of which the declaration is made.

(7) On the hearing of an application under sub-section (1) or (2) the liquidator may himself give evidence or call witnesses.

[34] It was the contention of learned counsel for the appellant that s 304(1) of the CA is meant to apply in a situation where there already existed creditors when the impugned and fraudulent conduct was allegedly committed by the errant director. It was the appellant's case that the respondents only became creditors in 2008 when it was admitted that the CNLT was not able to pay them, as employees of CNLT, their salaries for March and April in 2008 despite an assurance that they were to be paid their salaries by CNLT.

[35] The appellant had complained because the learned trial judge had gone way back in point of time to consider the conduct of the appellant in 2007 as well. That according to learned counsel was unwarranted.

[36] We had looked at the records of appeal and what we saw was that the EPF contributions from the respondents in 2007 though deducted from their

salaries were nevertheless not remitted to the employees' provident fund. Neither were CNLT's contributions in respect of the respondent employees remitted to the said fund. Yet during these times, the CNLT, primarily through acts attributable to the appellant, who was then the managing director of CNLT, had continued to do business ,in order to exhibit to the creditors that it was a going concern when in fact, it was not. That is an incidence of fraudulent carrying on of business. In fact, there was direct evidence as to the intention of the appellant to defraud the creditors way back in 2006, if not in 2004 when he told Man Mohan Thapar, D2, that it was his intention to make it appear that CNLT was seen as a going concern to the creditors when in fact it was not (see p 52 of the learned trial judge's GOJ).

[37] The fact that the respondents were entitled to the sum as prayed in their statement of claim ('SOC') could not be disputed as the liquidators had accepted their proof of debt forms, thereby acceding to and confirming that these monies were due and owing to the respondents. In the words of the learned trial judge:

> In short the claims of the employees have been accepted as valid debts under the law. They rank however, as unsecured creditors.

This can be seen at p 7 of her grounds of judgment.

[38] To our mind, the law on s 304 of the CA has been discussed by the Court of Appeal in the case of *Siow Yoon Keong* case. The case is important as it stated two important points in relation to that section. The first point relates to the use of the phrase 'if it appears' which, according to the learned appeal justices would indicate a lower threshold in order to trigger its operation. Bearing in mind that this is a civil claim, the burden on the plaintiff to establish its case is lower than if it had been a criminal charge. The second point has been the fact that Their Lordships had made a finding that it does not matter whether s 304 of the CA contains in it both civil and a criminal provision. If such has been the intention of Parliament as so reflected in the section, there is nothing amiss about it. What is clear to our mind is that the civil provision in sub-s (1) and the criminal sanction in sub-s (5) are properly carved out and they do not interfere in each other's operation. Such a drafting landscape with regard to s 304 of the CA may have been a result of its historical legislative journey in the UK. But whatever it is, its present statutory form must necessarily be given its desired effect. The *Siow Yoong Keong* case has given it such effect and, with respect, we see no reason to differ from the opinion expressed by that former bench of this court in that case.

[39] What s 304(1) of the CA requires to be proved is that the errant person must be shown to be the person who was responsible to doing business of the company in such a manner so as to defraud the creditors of the company.

[40] We now revert to how the learned trial judge had dealt with the matter of interpreting s 304(1) of the CA. We found her reading of the sub-s (1) to s 304 of the CA at para 42 in her grounds of judgement. It reads:

> 42. In determining whether there has been dishonesty I accept, with respect, Lord Hoffman's definition above and determine that this must be a question of fact to be ascertained from a consideration of the entirety of the relevant circumstances. The mere fact of directors carrying on business when they know that there is no prospect of the creditors being repaid therefore does not, of itself, warrant a finding of an intention to defraud purely on that basis alone. There must be something more. The fact of knowingly trading while insolvent such that the directors are aware that the creditors will not be paid, coupled with a conscious impropriety in the conduct of the business amounting to dishonest conduct, may well be sufficient to meet the threshold requirements of this section.

[41] To our mind, she had carefully discerned what was required by sub-s (1) to be proved by the plaintiff. To her, merely doing business with knowledge that the company will not be able to pay later is not per se sufficient to trigger that subsection. There must, according to her, be proven as well the element of dishonesty on the part of the alleged perpetrator when such business was conducted. What would amount to dishonesty would depend on the circumstances of each case, but dishonesty there must be on the part of the alleged perpetrator. She relied on the decision of Lord Hoffman in the case of *Aktieselskabet Dansk Skibsfinansiering v Brothers and ors* [2001] 2 BCLC 324 where it was held that in looking for the element of dishonesty, it can be established by taking into consideration the entirety of the relevant circumstances. With respect, we are in agreement with the learned judge's interpretation of s 304(1) of the CA. The evidence in this case had shown clearly many circumstances on the part of the appellant where such element of dishonesty on his part can be readily attributed to him. We cannot agree with submissions by learned counsel that this had been a case of a failed but honest business venture of a businessman chasing after the pot of gold at the end of the rainbow. In fact, it was far from it. We therefore see no merit in the submissions on that issue by learned counsel for the appellant.

[42] It was also contended before us that there must be a scheme to defraud on the part of the appellant. Must there be scheme to defraud? To our mind, that would not be necessary to trigger the invocation of s 304 of the CA. To our mind, the wordings of s 304 of the CA do not lend itself to be read in such a manner as was submitted by learned counsel for the appellant in that there must first be established the existence of a scheme to defraud the creditors. A single act of doing business to defraud a creditor would be sufficient to trigger an action for compensation against the errant person in his personal capacity. Indeed the phrase employed by the section was 'any business of the company' and as cases had shown, even a singular act of doing business with such nefarious intent against the creditors would suffice to stick liability on the

errant person responsible for such an act. Again the case of *Siow Yoon Keong* case is a good illustration of such being the case. In the *Siow Yoon Keong* case, what had happened is that Siow who was the managing director of the company ('Ventura') who had a joint-venture arrangement with the respondent company ('H Rosen Engineering BV') had used Ventura's money to invest in shares on the stock exchange under his own name, instead of paying the said money to Rosen pursuant to the terms of the joint-venture agreement. He had acquired the shares by utilising funds which were meant for Rosen. But later, on realising that he was about to incur losses on the investment, he then arranged for the company Ventura to pass a resolution ratifying all his past investments making himself a trustee for Ventura. The effects of his corporate move had been two pronged: (1) His use of the money meant for Rosen for his shares was legitimised; and (2) He recovered his personal losses as a result of the purchase of the shares in full from Ventura, as the shares were then held by him as a trustee for Ventura. Siow was found liable for the loss incurred by the respondent Rosen in the High Court. On appeal to the Court of Appeal, the decision was affirmed. In its judgement, the Court of Appeal had occasion to say: Was the business of the company being carried out? We have no problem answering that question in the affirmative, without even referring to any authorities. Resolution was passed to ratify the investments, perhaps more correctly, 'speculations'. The company's funds were used to pay for the losses of the appellant. Rosen, to whom RM423,000 was due, was not paid. These acts in our view constitute 'carrying out business of the company'. In coming to that conclusion, the Court of Appeal had made references to the following cases. In the case of *Re Augustus Barnett & Sons Ltd* [1986] BCLC 170, the court there held that the act of providing letters of comfort to a subsidiary was an act that had amounted to 'carrying on the business' of the company. Yet again, in the cited case of *In re Sarflax Ltd* [1979] 2 WLR 202 the same phrase 'carrying on the business' would not necessarily connote the active carrying on of trade. In a criminal case of *R v Grantham* [1984] 3 All ER 166 the obtaining of credit for the company was held to be carrying on the business of the company. In the circumstances of the *Siow* case it was held that the phrase 'carrying on business' was established. We can find no reason to depart from the principles that are discernible from the *Siow* case. As such, we find no merit in that argument by learned counsel for the appellant in that regard.

[43] We also are of the view that the decision in *Re Leitch (William C) Bros Ltd* [1932] 2 Ch 71 as cited in *Siow* case still represents the law on what would or could amount to a 'fraudulent' purpose under s 304(1) of the CA. In that case, Maugham J (as he then was) had this to say:

> ... if a company continues to carry on a business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying on business with intent to defraud.

[44] It was also the complaint by the appellant that the evidence as led by the respondents did not prove the claim under s 304(1) of the CA. In essence, learned counsel was saying that the learned trial judge was in error when she ruled that the respondents had proven their claim and found the appellant to be liable under s 304(1) of the CA on the evidence as led before her. We had considered the appeal records and the able submissions of both learned counsel on this matter and with respect, we are of the view that the learned trial judge was justified in concluding the way she did.

[45] Indeed, the learned trial judge was justified in coming to her decision that the appellant was liable for the claims against him under the provisions of s 304(1) of the CA. There was overwhelming evidence to that effect, such that however one were to look at it, it was very clear that CNLT's actions, through the appellant, who was then the managing director, had been designed to defraud the creditors. He was dishonest in his dealings the results of which had been that the creditors had been defrauded. The fact that only the employees had decided to initiate a suit against him and the other defendants does not make any difference a single bit, as he had, in his capacity as the managing director of CNLT carried on business that had defrauded the creditors. He had dealt in transactions that had dubious objectives which not only had adverse ramifications on the CNLT itself, but they had also the effect of defrauding the creditors by holding out that CNLT was a going concern, so that the creditors would continue to do business with CNLT, when in fact, the latter was insolvent. Among others, it had involved fictitious and highly dubious transactions, for instance the payments to JCT without any valid supporting documents that could justify such payments, which were made over and above the legitimate interests of other creditors. In that payments to JCT there was not even any demand made for payment by CNLT. This was not surprising, as there was correspondingly no formal orders for the supply of yarn to CNLT by JCT. We are of the considered view, on the authorities referred to above in the preceding paragraphs of this judgment, that those payments made to JCT were business transactions that were carried out by the appellant to defraud the creditors, as they were clearly deprived of repayments of their loans to CNLT. As such, the learned trial judge was justified in making the consequential order against JCT to repay the monies so dubiously paid to it back to the provisional liquidators of CNLT. The dishonest intention on the part of the appellant in behaving the way he did was all too clear to see and too obvious to be ignored. The learned trial judge was entirely correct in coming to her conclusions as she did.

[46] We do note as well that there was no appeal by the respondents against the adverse finding by the learned trial judge on conspiracy to injure for lack of evidence before her, for her to make a positive and affirmative finding of

conspiracy to injure against the relevant defendants. As such, we will say nothing more in respect of such finding.

[47] With regard to the claim premised on s 304(1) of the CA, we noted that the learned trial judge had approached the claims in a systematic manner that had helped given clarity to a potentially messy appreciation of the evidence which in themselves have been voluminous. It had given structure to better appreciate this case. We believe all parties would have no issue with that. Neither do we seek to depart from that approach taken by the learned judge.

[48] After perusing the records of appeal, we are, with respect, unable to agree with the contention of learned counsel for the appellant that the evidence as led by the plaintiffs had not made out their claims under s 304(1) of the CA. On the contrary, the findings of the learned trial judge had been backed by cogent evidence which had enabled her to arrive at strong findings of facts, in favour of the plaintiffs. But, as noted, she had been very fair and she did not rule entirely against the appellant, with a single stroke of the brush, although she had found as a matter of fact that the appellant was not a credible witness. Where there were documentary evidence that supported the appellant's contention, she had indeed given him that benefit, and to our mind, rightly so. But by and large the evidence were stacked heavily against the appellant such that they could be described as being overwhelming against him.

[49] As such, we are satisfied that the learned trial judge had been correct when she had found that the plaintiff had succeeded in proving their case under s 304 of the CA. The element of 'intent to defraud creditors' has been established when she positively answers the following issues (except issue No (iii)) raised by the plaintiff, namely:

Issue (i): CNLT, primarily through its managing director, Sahgal, prepared or issued fictitious invoices in 2007 to an entity known as MTI (Far East) Sdn Bhd with a view to inflating or overstating its revenue, such that CNLT would appear to be a 'going concern', or at the very least, not as insolvent as it actually was

[50] This was reflected in her findings in paras 90–93 of her grounds of judgment, as follows:

> 90. Having heard the evidence at some considerable length, and having considered the documentary evidence as a whole it appears to this court that the 37 invoices were indeed fictitious. In this context I found the forensic accountant, PW6 to be a reliable witness. He withstood the lengthy cross-examination well, and did not retract his finding that there was a clear intention to mislead or 'defraud' in relation to these 37 invoices. He maintained that they were fictitious for the reasons I have set out above. He was an independent witness in that he had no personal interest in the outcome of this matter. The thrust of the cross-examination centred on the viability of the FHMH report which concluded that the invoices were likely to be

genuine. However, given that no one from FHMH testified or was cross- examined on the same, I am unable to give the same weight to that report as I can to the forensic accountant's several detailed and comprehensive reports. More significantly it is evident that there was some deliberate editing of the FHMH report in relation to a material finding in relation to the inflation of income for the second and third quarters of 2007, which was subsequently deleted in the final report. This again was not explained. It is clear to my mind that the forensic accountant's report is to be accorded considerably more weight than that of FHMH. The only 'shortcoming' as it were, would be the inability on the part of the forensic accountant to interview and consider Sahgal's version of events. However his version of events was ventilated in full in court. Having heard him, I am satisfied that he is not a credible witness. For the purposes of this allegation relating to the 37 invoices, I conclude that they are fictitious by reason of a consideration of the evidence I have set out above. I found Sahgal's version of events to be simply incredible and difficult to believe. The lack of any form of documentary trail to evidence the authenticity of these transactions coupled with the fact that a handwritten internal memorandum suddenly surfaced after this irregularity was highlighted, cemented my view that he was not being truthful in the witness box. Apart from the foregoing evidence which supports my conclusion, the following matters are also contradictory and support my conclusion that the invoices are fictitious and were raised purely to inflate or exaggerate CNLT's income for the second and third quarters of 2007 so as to give CNLT an appearance of being a 'going concern'.

(i) The date of the proforma invoice for the purported sale of goods to Minerva was 20 September 2007, while the internal memorandum on the cancellation of the alleged sale to MTI was dated 3 October 2007. Is it possible that the intention to sell the goods to Minerva was mooted before the rejection of goods by MTI?

(ii) No evidence of the existence of these goods packed and ready for shipment to either MTI or Minerva. The provisional liquidators found no sign of this quantity of goods which would require considerable storage space;

(iii) The invoices are dated between May and July 2007. Production of yarn had dropped drastically due to a shortage of raw material prior to this in April 2007.

(iv) PW2 testified in the course of her evidence as a delivery clerk in CNLT that around this period she was requested by

(v) Sahgal's secretary to raise various invoices without the physical goods. She was not cross-examined on this point;

(vi) Why would a company in liquidation that had ceased operations take delivery of such a quantity of goods, that too with no documentation whatsoever?

(vii) How could such a company in liquidation procure financing from Minerva, a finance house established in the British Virgin Islands?

91. I therefore concur with learned counsel for the plaintiff that the totality of the evidence bears out the conclusion that in reality the sums of money remitted by Minerva to CNLT was for a wholly different purpose. The forensic accountant

found that there was in fact a loan agreement between one Roneel Securities (GB) Ltd and CNLT whereby Roneel agreed to provide CNLT a loan amounting to USD1.85m. Roneel is a substantial shareholder of CNLT. This agreement was signed by Sahgal.

92. Minerva Financial acted as an agent for Roneel which advised Sahgal of the remittance of USD1.15m and

USD700,000 on the 15 and 18 of June 2007. It was in the nature of a loan rather than payment for the supply of any yarn.

93. Given the foregoing, the entire version of events about Minerva taking up stock purportedly produced for MTI is also less than credible. I therefore find as a fact that the 37 invoices, on the entirety of evidence before this Court, were fictitious. They were created specifically to establish that CNLT was a 'going concern' in 2007. However by reason of the provisional liquidators and the forensic accountant querying the authenticity of these invoices, steps were taken by Sahgal to screen or hide this deliberate falsehood. This led to an invention of a further series of events to explain how this alleged quantity of yarn was purportedly dealt with. These events appear to this court to be a fabrication and a sham, concocted purely to try and explain the fictitious invoices. The first allegation relating to the fictitious invoices is therefore established".

Issue (ii): The value of the plant and machinery of CNLT was deliberately exaggerated, overstated or exaggerated to present CNLT as a going concern has been made out

[51] This is based on the evidence by Rajendran a/l Muthusamy ('PW1') who was CNLT ex maintenance manager, that he was instructed by Sahgal to give misleading information to the valuer about the value of machinery (see paras 94–98 of her grounds of judgment).

[52] The valuation report of Colliers dated 30 June 2016 indicated that the book value accorded to the plant and machinery was RM13.9m greater than its actual value (see para 99 of her grounds of judgment).

[53] The accounts for 2006 were not entirely accurate as they contained an inflated or exaggerated figure for the value of machinery. There was also an element of duplicity initiated at the behest of Sahgal when the double spinning frame was allowed to be valued, mistakenly, twice, again resulting in a fictitious inclusion of some RM11 (see paras 101–109 of her grounds of judgment).

[54] The court had rejected the opposing view given by Ferrier Hodgson in its alternative report because the maker was not available for cross-examination, unlike the forensic accountant who was available and defended his finding satisfactorily (see para 111 of the grounds of judgment).

[55] Therefore the learned judge had concluded that the second allegation that the value of plant and machinery was deliberately overstated or exaggerated to present CNLT as a going concern was made out.

Issue (iii): A portion of CNLT's funds/monies were 'siphoned' by way of payments to one Golden Privilege Sdn Bhd ('GP') purportedly for rental when no tenancy agreement subsisted and Golden Privilege is controlled by Sahgal and D7 ie the Human Resources Manager

[56] The court found that it was not made out. This is because the learned High Court judge satisfied with Sahgal's response on this issue that CNLT had made disclosures of related party transactions concerning Sahgal's interest in GP as stated in paras 117–122 in her grounds of judgment, quoted as follows:

> 117. Sahgal meets this contention by responding that GP was incorporated on 22 June 1993. It was a dormant company. It was struck off the Register of Companies on 6 February 2007. CNLT had made disclosures of related party transactions concerning Sahgal's interest in GP.
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> 118. He further stated that the Board had approved the payment of rental for his residence in the sum of RM12,000-00 as part of his remuneration package. This was in August 1999. He concurred that there was no tenancy agreement between GP and CNLT. However such payments were a 'perk' or benefit in kind which he enjoyed as Managing Director. And such payments were utilised for his residence as he was an expatriate. In short it was a housing allowance which comprised a part of his contract of employment.
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> 119. This benefit which comprised a part of his employment contract continued when he was promoted to the position of general manager. He then approached the board of directors of CNLT and requested that he be entitled to the value of the housing accommodation. The board agreed to this. As such it was not necessary for him to utilise the said emolument solely for rental of premises. The rental was classified as a 'benefit in kind' at all times in CNLT's annual reports and properly disclosed under the title 'Directors' Remuneration'. Sahgal had also disclosed this rental payment as part of his income to the Inland Revenue Department and paid income tax on the said income.
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> 120. He further explained that the rental had been paid to GP at his request and the board had agreed. Sahgal then declared this housing perk as part of his income and paid tax on the same, as borne out by his income tax returns.
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> 121. After Sahgal purchased his house from Advance Point, the property developer of Kasturi Klana Park in 1994, these rental payments were utilised towards paying off the purchase price of the subject property. He conceded that CNLT had given him a loan to partly finance the purchase of this house from Advance Point prior to it being listed. The debt as such isbetween Sahgal and Advance Point and does not involve CNLT.
>
> 122. He therefore maintained that in view of this full disclosure there was no question of monies being siphoned off from CNLT. All 'rental' payments were

properly documented and properly accounted for. In any event these emoluments comprised a part of his income due under his contract of employment and his utilisation of these monies for the purposes of paying off the balance purchase price of a property he had purchased did not amount to a drawing off of monies belonging to CNLT.

Issue (iv): CNLT's assets in the sum of USD1.25m (approximately RM4.75m) were dissipated or channelled to CNLT's largest shareholder, JCT Ltd, the eighth defendant in this suit after CNLT had been listed as a PN17 company and its auditors had expressed concerns about its viability as a 'going concern'?

[57] The learned High Court judge found that the payment of USD1.25m to JCT Ltd was a preferred repayment of an advance to an unsecured creditor and shareholder in preference over the rest of the body of unsecured creditors. It contravened s 293 of the Companies Act 1965 read together with s 53 of the BA. (Refer to para 135 of her grounds of judgment.) She based such findings as she found that Sahgal's evidence to be entirely implausible for the following reasons:

(a) there is no documentary evidence substantiating this alleged order for ordinary as well as 'specialised' yarn from JCT Ltd. There is only Sahgal's oral evidence;

(b) there is no documentary evidence in relation to the alleged late supply of such yarn. In fact there is no evidence that JCT Ltd required this yarn as of February 2007;

(c) there is no written demand from JCT Ltd for compensation for such alleged late delivery. On the contrary there is simply nothing in writing on this subject between the two entities, CNLT and JCT;

(d) there was no discussion at the board level in CNLT in relation to the issues of either a refund of the sum of USD890,000 or compensation of USD360,000. It would be expected that a decision to refund such large sums of money and to voluntarily pay out compensation of USD360,000 particularly in a company which had just declared itself to be in a financially precarious situation would require serious deliberation, not to mention disclosure to several authorities;

(e) these payments were not disclosed to the audit committee. In this context therefore Izham and Ishah had no knowledge of such disbursements;

(f) the decision to allegedly 'refund' and 'compensate' JCT Ltd could only come from Sahgal and the resident Indian Directors or one or more of them;

(g) these payments were not recorded in the audited accounts of either CNLT or JCT Ltd;

(h) no announcement was made to Bursa in relation to these substantial payments out to CNLT's largest shareholder;

(i) these payments out to JCT Ltd were made after it was announced that CNLT had been classified as a PN17 company and after the announcement that it had suffered substantial losses for the first quarter of 2007;

(j) Man Mohan Thapar, D2, had written a letter on 29 March 2007 to CIMB, a secured lender of CNLT seeking support and confirming that RM3.2m had been brought in by shareholders in December 2006. This is exactly the amount which was remitted by JCT Ltd to CNLT in the form of USD890,000. However Sahgal chose to explain these monies as having been remitted for the purchase of goods by JCT Ltd from CNLT. In other words D2's letter too evidences the fact that the sum of USD890,000 was a shareholder advance by JCT Ltd to meet the flailing needs of CNLT;

(k) this sum of money was reported as a shareholder advance from JCT Ltd in CNLT's 2006 annual report;

(l) despite the recording of these monies as an advance from JCT Ltd there is no record of these monies having been remitted back to JCT in June 2007. Neither is there any corresponding reduction shown in JCT Ltd's shareholder advances; and

(m) there is no explanation forthcoming from JCT Ltd in respect of this entire transaction as no witnesses testified on its behalf. Instead it relied on the evidence of Sahgal.

[58] Even with the knowledge that knowing that CNLT was not a going concern, Sahgal and those directors in control of JCT Ltd decided to exit CNLT by June 2007 with a recouping of as much of CNLT's assets as was reasonably possible, including their advances. This seriously depleted the assets available to the body of unsecured creditors, including the employees.

[59] At the same time that such siphoning was being undertaken however, and despite knowing that CNLT was no longer a going concern, representations continued to be made to creditors, particularly the employees from 2007 to April 2008 that CNLT was in fact a going concern that was to be restructured. This comprises a key element of the fraudulent trading that is envisaged in s 304 of the Companies Act 1965. The 'deception' as it were continued throughout 2007 and onwards past May 2008 until the provisional liquidators were appointed. No efforts were made by the directors thereafter to

deal with the employees' benefits until they were effectively discharged by the order of winding up of CNLT on 16 September 2009 (see para 139 of the grounds of judgment).

Issue (v): CNLT, through, inter alia, Sahgal caused three cash cheques in the sum of RM160,000 to be issued on 11 September 2007 after the appointment of provisional liquidators on 6 September 2007. These three cheques were encashed on 12 September 2007, resulting in a further channelling of funds in the sum of RM160,000 to D7

[60] The learned trial judge found that this contention of the plaintiffs has been borne out by the evidence, which amounts to a wrongful dissipation of the remaining assets of CNLT. This is so, more particularly because provisional liquidators had by then been appointed to preserve the assets of CNLT for the entire body of unsecured creditors. All Sahgal's explanation is not tenable as there is no evidence produced to support his justification (see paras 142–145 of the grounds of judgment).

Issue (vi): CNLT failed to remit employees provident fund and social security organisation contributions, both employer and employee, despite deducting the requisite employee contribution. Neither was income tax paid, despite the requisite deductions having been made. As a consequence civil suits were filed by the employees against the first to sixth defendants

[61] This fact is not disputed. The failure to remit these statutory payments amounted to a deliberate omission, with the dishonest intention of channeling these funds out of CNLT in favour of preferred unsecured creditors and shareholders. So this allegation is substantiated (refer to paras 148–152 of her grounds of judgment).

Issue (vii): Sahgal dissipated assets out of the reach of the provisional liquidators in May 2008

[62] Even after the appointment of the provisional liquidators, Sahgal had removed the stocks of material which he had disclosed in the statement of affairs as belonging to CNLT to other warehouse on 3 May 2008. His email dated 18 July 2008 which stated among other 'Do not worry, materials are safe, once we return PL on 23rd, we can move as we like, *I moved the goods so that it is not easily in reach of the provisional liquidators so far it is working well. I hope you understand this*' suggested that Sahgal had deliberately sought to conceal the company's assets in the premise of V-Top.

[63] In this context, the provisional liquidator's report stated that Sahgal had only verbally advised them that the said stock had been transferred to a

warehouse. The statement of affairs did not disclose that the stock was being stored or kept at V-Top as suggested by Sahgal in his email. When the provisional liquidators had asked on appointment where these stocks were warehoused, they had received no answer from Sahgal (see para 160 of her grounds of judgment).

[64] Sahgal also tried to explain what he meant in his email was that once the provisional liquidators had been removed, the subject goods or monies could be given to Global Tradewell, but that he had no intention of parting with those goods to Global Tradewell at that juncture in view of the appointment of the provisional liquidators. Sahgal also maintained that there were other relevant emails which were not available, his email having been hacked.

[65] He maintained that he had reiterated to V-Top that the goods stored there were CNLT's goods which were stored there for safety. In short he denied any deliberate attempt to siphon off or conceal these goods (see para 163 of her grounds of judgment).

[66] However the learned trial judge had found that there was nothing in writing to substantiate Sahgal's version of events. The fact that Sahgal was found to be in contempt of court because Sahgal refused to hand over the necessary documents or hand over control to provisional liquidator satisfied the plaintiffs' allegation that Sahgal had dissipated assets out of the reach of the provisional liquidators.

Issue (viii): Were unauthorised payment made out of CNLT's assets during the period when the retraining order was in place without validation?

[67] CNLT obtained a restraining order on 26 October 2007 under s 176 of the CA. The restraining order continued in force until 7 April 2008, ie, for a period of slightly more than five months. During this time payments were made out to preferred unsecured creditors, as well as some shareholders in the sum of not less than RM2,841,696, without any validation order being procured. Such payments were made between 26 October 2007 and 7 April 2008. This includes payment of RM50,104 from CNLT's monies to Sahgal. Sahgal maintains that these monies comprised the repayment of a loan he had earlier afforded to CNLT however there is nothing in writing to substantiate that such a loan was ever given to CNLT by Sahgal personally. Such payments were also not in the ordinary course of business of CNLT (see paras 170–172 of her grounds of judgment).

[68] Therefore, the learned High Court judge found that this allegation has also been made out. Sahgal had deliberately sought to dissipate assets even after the appointment of provisional liquidator.

[69] As such, it is our considered view that the findings of facts made by the learned trial judge had been impeccable. As regards her findings against JCT, suffice it is for us to say here that they are considered in the separate judgement for that appeal by JCT. Her findings on the law pertaining to s 304(1) of the CA were also correct. We noted that in the *Siow Yoon Keong* case there was only one transaction that had the effect of amounting to carrying on business with an intention to defraud a creditor and that it had qualified as a case fit and proper for a declaration as envisaged under s 304(1) of the CA. In comparison, here in this appeal, we have overwhelming evidence that had shown clearly that CNLT through Sahgal, had carried on business that clearly had intention to defraud the creditors, including the plaintiffs. They were done to give the impression that the CNLT was a going concern when it was not. Objectively, the effect of such action by Sahgal would be to deceive creditors in the sense that they would not foreclose on the loans given to CNLT. Again the fraudulent siphoning of monies to JCT would also deprive creditors of ready funds that could be used to service their loans. The non-remissions of the EPF contributions of both company's and the employees-plaintiffs and the false promises of payments of salaries to the plaintiffs are again instances of such fraudulent intent on the part of Sahgal who then was the managing director of CNLT. In the context of the evidence adduced in this case, Sahgal was properly the person envisaged under s 304(1) of the CA against whom the declarations had correctly made in her judgement. In that regard the alternative submission by learned counsel for Sahgal that Sahgal was not liable under section s 304(1) of the CA must also fail.

[70] Perhaps, we would be more than justified to repeat the words of the Court of Appeal in the *Siow Yoon Keong* case and apply them *mutatis mutandis* to this appeal:

> By any standard, civil or criminal, clearly there was an intention to defraud Rosen or that it was done with a fraudulent purpose. Note that the section only uses the term 'if it appears' which indicates that a lower degree of proof is required. But, even on a degree of proof, the result would be the same.

[71] The evidence led before the court in this case had just been overwhelming in bearing out the impugned conduct of CNLT, actuated to a great extent by its managing director, named Sahgal, the appellant in this immediate appeal before us. The learned trial judge was correct when she declared that the business of CNLT (Far East) Bhd was carried on by Sahgal with intent to defraud the creditors pursuant to s 304 of the Companies Act 1965.

THIS COURT'S DECISION

[72] In the upshot therefore, we will dismiss this appeal as it is totally lacking in merits. There is more than ample evidence flying in the face of the learned trial judge for her to come to the decision that she did, and we find no cogent reasons whatsoever to disturb her findings pertaining to this appeal. As regards the standard of proof issue, if indeed she had erred, it is our respectful view that she had erred in favour of the appellant and no miscarriage of justice was visited upon the appellant. In the final analysis, we are of the considered view that the learned trial judge was not plainly wrong in deciding the way she did. As such, this is no occasion for us to exercise our appellate powers (see the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309). We therefore affirm her decision with costs.

[73] As to costs, after hearing parties, we had awarded a sum of RM50,000 to the 1st–83rd respondents. We also had ordered costs to be paid by the appellant to the 84th respondent.

[74] We ordered too, that the deposit to be returned to the appellant.

Appeal No 1229 dismissed.

Reported by Afiq Mohamad